



Submission

Submission on the Environmental Reporting Bill (14 April 2014)

Introduction

1. I support giving legislative effect to a process for regular and comprehensive reporting on the environment.
2. It is in the interests of all New Zealanders to have comprehensive and reliable information available regularly on environmental issues that affect all of us.

Clause 16

3. I do however have significant concerns with one aspect of the bill, namely clause 16, under which the Secretary for the Environment (MFE) and the Government Statistician can veto release of information to be used in an environmental report.
4. Clause 16 has the following elements.
 - Subsection 1 provides that if a person involved in producing or publishing an upcoming environmental report receives a request for “information” or “analysis” being used in the report they must refer the request to the Secretary for the Environment and the Government Statistician.
 - Subsections 2 and 3 give the Secretary for the Environment and the Government Statistician the power to veto disclosure of the information if it “would compromise the independence of the report”, or if it is “integral to significant findings or conclusions of the report”.
 - Subsection 4 provides that the section overrides other enactments.

5. While I understand that the provision is intended to apply to requests for information relating to reports prior to their publication, this is not entirely clear from the section and it could be read as applying to information in any report, irrespective of whether it has been published.

Undermining of purposes of Act and Official Information Act

6. Even if the provision applies only prior to publication (ie. for a period of up to three years, being the reporting period under the Bill) in my view it significantly undermines the key purpose of the bill, being to provide the public with quality and timely information about the state of the environment.
7. The provision would provide the Secretary for the Environment and Government Statistician with broad and discretionary powers to veto access to important information about the environment that would otherwise be subject to the Official Information Act.
8. The breadth of the powers vested in the Secretary for the Environment and Government Statistician and the supremacy of the clause over other legislation are such that the clause could also operate to fetter the powers of the Ombudsmen and other Officers of Parliament to obtain information in the performance of their statutory duties. This is of course of considerable concern.
9. Provisions of this kind are inconsistent with a key principle underlying the OIA, which is that information should be made available upon request unless there is, objectively speaking, good reason to withhold it. Good reason exists only where identified public interests would be harmed or prejudiced by release of the information at issue. Here information may be withheld simply because it is, in the subjective opinion of the Secretary of the Environment or the Govt Statistician, 'integral to significant findings or conclusions of the report', even though no harm may come from early release, and such release may be in the wider public interest. This is an unacceptably low threshold to justify the withholding of important environmental information. The test for withholding this information should be harm-based, and reviewable by the Ombudsman under the Official Information Act.

Independence of reporting regime

10. I understand that a key driver behind the section is a concern to ensure that State of the Environment Reports are independent from the government of the day. As an independent statutory officer I fully support that goal. However the proposed provision would be unlikely to achieve that goal and instead could impact adversely on the transparency, independence and overall integrity of the reporting process.
11. The Secretary for the Environment and Government Statistician are required to act independently under clause 14. Their requirement to act independently is, however, at odds with their broad powers to suppress access to information in clause 16. An untrammelled and non-reviewable ability to suppress access to environmental

information to be used in a report could compromise the robustness and transparency of the reporting process, or at worst be used to skew the contents of a report.

12. Under clause 16(2)(b), access to information or analysis could be vetoed by the Secretary for the Environment or the Government Statistician if it was “integral to significant findings or conclusions of a report”. This subsection could have the effect of suppressing highly significant environmental information from the public. This is counter intuitive and at odds with the Bill’s purpose of making comprehensive information about the environment available to the public.
13. The Official Information Act provides a robust, comprehensive, and objective statutory process for determining whether official information ought to be withheld. A draft report may be protected under the Act where its premature release would harm one of the interests protected by the Act. Where no such harm would ensue, or where any harm would be outweighed by the public interest in disclosure then it must be released. I see no reason to depart from these time tested and common sense principles.

Bolstering of statutory independence

14. Any concerns about government interference in the statutory independence of the reporting process would in my view be best addressed by a clause akin to section 113 of the Crown Entities Act 2004 which expressly precludes ministerial directions to Crown entities in relation to their statutorily independent functions. Such a clause would augment the duty to act independently that would vest in the Secretary and Government Statistician in clause 14, and operate to safeguard the independence and integrity of the reporting process.

Conclusion

15. I urge the Committee to remove clause 16 from the Bill and consider replacing it with a provision precluding Ministerial directions with respect to reports.

I am available to address the Committee on this submission.

Dame Beverley Wakem DNZM, CBE
Chief Ombudsman